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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-.....

FRUEHAUF CORPORATION,
Petitioner,

VERSUS

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Fruehauf Corporation (Fruehauf) petitions that a writ of certiorari be issued in this case to review the decision of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Findings of Fact and Conclusions of Law and Judgment entered by the United States District Court for the Western District of Oklahoma and that Court's subsequent Order denying the plaintiff's Motion to Vacate the Judgment for Attorney Fees are not published. They appear at Appendix A1-A14, *infra*. The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 609 F.2d 434 and is reprinted at Appendix B1-B5, *infra*. The Order of the Circuit Court denying rehearing is reprinted at Appendix C1, *infra*.

JURISDICTION

The Court of Appeals entered its judgment on November 9, 1979, and, on December 26, 1979, denied a timely Petition for Rehearing. This Court has jurisdiction under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Can a Circuit Court disregard this Court's decision in *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412 (1978), and the Congressional mandate in 42 U.S.C. 2000e-5(k) and assert the trial court's award of attorney fees was abuse of discretion where defendant prevailed in an action brought by the Equal Employment Opportunity Commission (EEOC) and the trial court found that EEOC's action was frivolous and not brought in good faith?

2. If EEOC does not even make a *prima facie* case in a Title VII case, are attorney's fees mandated by 2000e-5(k)?

3. Did 2000e-5(k), as interpreted by *Christiansburg*, provide that the test as to whether fees should be awarded is subjective determination of discrimination by employees, or determination by the court of EEOC's lack of objective reasonableness in filing or continuing to prosecute an action?

4. Should the conflicting decisions rendered by different circuits interpreting *Christiansburg* be clarified by another ruling of this Court?

STATUTORY PROVISIONS INVOLVED

42 U.S.C. 2000e-5(k):

"In any action or proceeding under this subchapter, the Court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorneys fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."

STATEMENT OF THE CASE

EEOC commenced administrative proceedings against Fruehauf on October 10, 1973, based on the complaints filed many months earlier by two Class A mechanics who claimed discrimination in not being made foreman. On May 27, 1975, EEOC invoked 28 U.S.C. §451, §1343, and §1345 and 42 U.S.C. §2000e-5(k), *et seq.*, charging Fruehauf had intentionally engaged in unlawful employment practices which discriminated by failing to promote blacks at its Oklahoma City facility.

Even at the January 6, 1977 pretrial, EEOC still referred only to the same two complaining parties. EEOC demanded broad sanctions as well as damages for the two complainants. The case came on for trial on April 20 and 21, 1977. The court filed its Findings of Fact and Conclusions of Law and Judgment which held for Fruehauf and awarded Fruehauf recovery of $25,000.00 of its costs and attorney fees (Appendix A).

The trial court properly looked into the qualifications of the two complainants as well as another long time black employee of Fruehauf alleged by EEOC after the pretrial

to be qualified to be foreman. Relying on considerable documentary evidence previously available to the EEOC in Fruehauf's personnel files, as well as hearing and observing the two blacks and Fruehauf's manager (all produced by EEOC), the court found none of the three black mechanics were qualified to be foreman, and also found EEOC's failure to properly investigate the complaints caused this unnecessary litigation. (Not until the time of trial did EEOC abandon one of the original complainants.) The trial court's sixty findings of fact and eight conclusions of law spell out the lack of qualification of the blacks, as well as EEOC's sketchy investigation and inadequate trial presentation.

McDonnell Douglass Corp. v. *Green*, 411 U.S. 792 (1973) mandated qualification as a requisite in three of the four elements of a *prima facie* case. EEOC had pursued Fruehauf on the two original complaints for over three and one-half years prior to trial. Yet those individuals were patently unqualified as was the individual EEOC belatedly interposed. *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412 (1978), decided after the trial court's ruling, held that attorneys fees may be awarded where the action is "frivolous, unreasonable or groundless," stating proof of bad faith was unnecessary. The trial court found EEOC's suit "was not in good faith and was frivolous in its inception", and also held EEOC failed to make a *prima facie* case.

EEOC filed a Motion to Vacate the Judgment for Attorney Fees and a hearing was held thereon. The trial court entered its Order on March 31, 1978 denying EEOC's Motion to Vacate the attorney fees (Appendix A14). An appeal to the Circuit Court of Appeals for the Tenth Circuit was timely taken by EEOC alleging the trial court had

erred both in denying the relief sought by EEOC and in awarding costs and attorney fees to Fruehauf. EEOC's brief conceded the trial court's ruling on the two original complainants was irreversible, but attempted to rely on the third black mechanic who EEOC's attorney persuaded to testify by offering him a Fruehauf foremanship that he admitted he may have said he didn't want, and for which he was only somewhat less unqualified than the abandoned complainants.

On November 9, 1979, the Circuit Court published its opinion (Appendix B) sustaining the trial court's ruling that Fruehauf had not discriminated. However, the Circuit Court reversed the costs and attorney fee award stating:

> "There is nothing in the record before us to support the trial court's finding that the action was frivolous from its inception, or that in prosecuting the action EEOC was motivated by something other than good faith, presumably bad faith."

The Circuit Court did not determine whether EEOC had reasonable grounds to both institute the suit and continue to prosecute the suit after discovery. Nor did the Circuit Court remand for consideration in light of *Christiansburg* as suggested by Fruehauf as an alternative (and as done in the Fourth and Fifth Circuits).

Fruehauf timely filed a Petition for Rehearing which was subsequently denied without further opinion.

REASONS FOR GRANTING THE WRIT

Christiansburg and Various Circuit Interpretations

EEOC cases are a major part of litigation in the lower federal courts today. Congress recognized the need to protect businesses from undue harassment when it adopted 42 U.S.C. §2000e-5(k). This Court previously interpreted a comparable statute in *Christiansburg Garment Co.* v. *EEOC,* 434 U.S. 412 (1978).

The *Christiansburg* doctrine has been applied in cases involving both EEOC and private litigants in Title VII actions, and also to fee awards under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988. Unfortunately, different results have been reached by different circuits.

In cases involving EEOC as plaintiff, the Fifth Circuit cases of *EEOC* v. *First Alabama Bank of Montgomery,* 595 F.2d 1050, 1056 (1979) and *EEOC* v. *Datapoint Corp.,* 570 F.2d 1264, 1271-72 (1978), are contradictory to the result obtained in the Tenth Circuit in this case. The Fifth Circuit affirmed an award in *First Alabama Bank* and remanded *Datapoint Corp.* for trial court action in light of *Christiansburg.* The trial court then awarded $90,890.00 fees and expenses in the related cases.

In private Title VII actions, the Second Circuit case of *Faraci* v. *Hickey-Freeman Co.,* 607 F.2d 1025, 1028 (1979), sustained an award of fees where plaintiff failed to prove his case. Also see *Prate* v. *Freedman,* 583 F.2d 42, 48 (2d Cir. 1978).

On the other hand, in another private Title VII action, *Bowers* v. *Kraft Foods Corp.,* 606 F.2d 816, 818 (8th Cir. 1979), upheld a ruling in favor of defendant but reversed the award of attorney's fees as did the Tenth Circuit in this case. See also *Middleton* v. *Remington Arms Co.,* 594 F.2d 1210, 1213 (8th Cir. 1979).

The Fourth Circuit vacated a decision which denied attorney's fees to a successful defendant and remanded for reconsideration in light of *Christiansburg* in *Tillman* v. *Wheaton-Haven Recreation Association,* 580 F.2d 1222, 1225-1226 (4th Cir. 1978).

The Third Circuit's decision in *Hughes* v. *Repko,* 578 F.2d 483, 489 (3rd Cir. 1978), in dealing with the successful defendant's right to an attorney fee, appears to use the same subjective test as the Tenth Circuit in deciding whether plaintiff prosecuted the suit in good faith.

The First Circuit and Fifth Circuit also applied *Christiansburg* under the Civil Rights Attorney's Fees Award Act of 1976. See *Olitsky* v. *O'Malley,* 597 F.2d 303, 305 (1st Cir. 1979) and *Lopez* v. *Arkansas County Independent School District,* 570 F.2d 541, 545 (5th Cir. 1978).

In summary, it appears that *Christiansburg* has received a different interpretation in the Third, Eighth and Tenth Circuits from that rendered in the Second, Fourth and Fifth Circuits. The *Christiansburg* interpretation enunciated by the Second, Fourth and Fifth Circuits, would appear to either (1) require that this case be remanded for consideration in light of *Christiansburg* or (2) for the Circuit Court to determine on appeal not only whether EEOC had reasonable grounds to institute suit against Fruehauf but also whether EEOC acted reasonably in continuing to prosecute this suit against Fruehauf after discovery. Clearly the reasoning conflicts with the Fruehauf decision.

Facts and Law in this Case

The findings of fact and conclusions of law of the trial court in this case were written prior to *Christiansburg* but were perceptive of this Court's subsequent ruling in *Christiansburg* as the 60th finding of the trial court is as follows:

> "The Court finds that the system employed by the plaintiff in determining whether or not discrimination occurred, is discriminatory, in and of itself, pitting blacks against whites and requiring blacks to determine discrimination against other blacks by whites. The Court finds that the Plaintiff conducted, at best, a sketchy investigation of the charges herein, and that only a superficial look behind the charges would have indicated that no discrimination was present. Accordingly, the Court finds that the suit brought by the Plaintiff on the basis of such investigation was not in good faith and was frivolous in its inception."

Conclusion of Law 8 reads:

> "Defendant is entitled to reasonable attorneys fees since this action was not justified. 42 U.S.C. §2000e-5(k)."

The Tenth Circuit Court disregarded the intent of the clear Congressional mandate and the equally clear subsequent judicial interpretation of a comparable statute in *Christiansburg* saying there was "nothing in the record" to support the trial court's finding, in spite of the trial court's sixty findings of fact and eight conclusion of law which collectively show the case presented by EEOC was frivolous, unreasonable and groundless, if not brought in bad faith.

The trial court's findings include a finding that there were at least three whites with similar lengevity to the complaining blacks who had never been promoted to foreman (F of F 15); Fruehauf had sought minority applicants for positions as service manager and foreman by advertising and solicitation (F of F 18); that none of Fruehauf's area competitors had a black foreman (F of F 19); that Fruehauf employed blacks in excess of the black population in the Oklahoma City SMSA (F of F 20); that one of the two original complainants had actually testified under oath in another matter that he didn't want to be a foreman and another would not deny that he had similarly expressed that he was not desirous of being foreman (F of F 26, 52). Of the two produced by EEOC both stated that they had not been required to do less desirable work or been paid less than equally qualified white employees (F of F 27).

Also the trial court's findings detail the lack of qualification of all three blacks (F of F 29-56). For example, the two original complainants were the most accident prone of all Fruehauf employees (F of F 35, 45). One had incurred twenty-three injuries in a period of two years which was exceeded only by his fellow complainant (F of F 35) (F of F 23 finds safety and efficiency are a business necessity). He could not write legibly and was insubordinate and the court observed his demeanor and articulation and found that he was incapable of adequately communicating, or understanding communications to a degree necessary to be a foreman (F of F 36, 37, 38). He was not concerned with the shop making a profit, and the court found that Fruehauf had every reason to actually dismiss him as an employee, rather than promoting him to foreman (F of F 39, 41).

The complainant who did not appear for the trial was absent more than any other employee in the branch for the past 31 years (F of F 44). He had suffered a nervous disorder and had a nervous breakdown (F of F 46). He had made 27 separate workman's compensation claims and had refused to perform duties assigned to him (F of F 45, 47). He didn't have knowledge of all areas of the shop (F of F 48). He had actually been retired on a physical disability pension in 1973, long prior to the filing of the EEOC complaint asking he be made foreman (F of F 49).

The belated foreman candidate located by EEOC after the time of pretrial acknowledged that he was aware that charges had been filed by the other two, and he had not joined with them (F of F 51). The trial court found that after pretrial, the third black had received a call from EEOC's attorney "asking him if he would like to be a foreman for Defendant, and at that time, upon that solicitation, agreed to testify in this cause. Harry King admitted that he may have stated that he did not want to be a foreman" (F of F 52). The findings also enumerate his lack of qualifications (F of F 53-57). The Circuit Court found that the trial court's judgment was not "clearly erroneous" on this third individual (EEOC's brief conceded the trial court ruling irreversible on the first two).

The findings also elaborate on EEOC's sketchy investigation during the more than four years from the original charges to the time of trial as follows:

> "The investigations were wholly inadequate and carelessly incomplete. Had a reasonable and objective investigation been undertaken, the Plaintiff would have easily found that there was no substance to the complaints whatsoever and Defendant would not have been forced to sustain the burden of defending itself." (F of F 58)

The trial court also found the affidavits of the complaining parties on which EEOC relied were written by EEOC's investigator. The investigator acknowledged he could have copied the original complaints in making his report without ever talking to the complainants (F of F 59).

The Circuit Court thus not only disregarded 2000e-5(k) and *Christiansburg* but appears to have disregarded the "clearly erroneous" rule which it did invoke in sustaining the trial court's decision on the question of discrimination. It seems clear that the Circuit Court simply could not bring itself to approve the award of attorney fees in compliance with 2000e-5(k) in the manner which this Court interpreted it in *Christiansburg,* the Fifth Circuit did in *Datapoint and First Alabama Bank of Montgomery,* the Second Circuit did in *Faraci,* and the Fourth Circuit did in *Tillman.*

In *Christiansburg,* this Court made it clear that even if the prosecution of the action was considered not frivolous, unreasonable or groundless in its inception, *if EEOC continued to litigate after it clearly became so,* Fruehauf should be entitled to reasonable attorneys fees. *Christiansburg* stated that proof of bad faith is unnecessary because no statute is necessary to sustain an award of attorney fees when an action is brought in bad faith. And then this Court stated:

> "And, needless to say, if the plaintiff is found to have brought or continued such a claim in bad faith,

there will be an even stronger basis for charging him with the attorney's fees incurred by the defense."

The trial court found before *Christiansburg* was written that EEOC's action was "frivolous in its inception and brought in other than good faith." Since the case was instituted two years after the original complaints, the trial court certainly had every reason to review the preliminary investigation after EEOC failed to present a *prima facie* case since EEOC had ample time to make an adequate investigation before undertaking this costly litigation. The trial court's decision was largely based on the personnel records that were made available to EEOC long prior to EEOC's finally filing suit. And even if the Circuit Court was not satisfied with this finding that the case was frivolous in its inception, *Christiansburg* obligated the Circuit Court to recognize the obvious failure of EEOC to even produce qualified persons at the time of trial. The Circuit Court should have either accepted the trial court's award of fees or in keeping with *Christiansburg's* teaching that EEOC must cease prosecution of a case when the case becomes frivolous, unreasonable or groundless, sent the case back for any further findings the Circuit Court felt were prescribed by *Christiansburg* as was done in *Datapoint* and *Tillman*.

EEOC appears to have merely shuffled papers and the consequences have been both expensive and endless to Fruehauf. Congress sought to avoid this. *Christiansburg* stated that Congress

> "wanted to protect defendants from burdensome litigagation having no legal or factual basis."

And the trial court in *Datapoint* referred to n.20 in *Christiansburg* and stated at 457 F.Supp. 62, 65:

> "The government is a wealthy litigant and can, if it so chooses, make litigation so expensive as to prohibit the defense of legal rights."

And continued:

> "Because of the peculiar power of the government litigator, he is subject to ethical consideration beyond the ordinary litigator."

EEOC subsequently paid the $90,890.00 awarded by the Texas District Court in the *Datapoint* cases in which the factual background is strikingly similar to those facts that led the trial court below to award $25,000.00 costs and attorney fees in the trial court.

The trial court also found that EEOC's system was discriminatory as practiced in this case. That this is very possible is supported by the Tenth Annual Report of the EEOC for the fiscal year ending June 30, 1975 (The Circuit Court's attention was directed to 22 Labor Law Reports, Issue 774, Part 2, published by CCH pointing out that of the 2,180 EEOC employees in 1975, 50.65% were black, 11.25% were Spanish, 1.1% were Indian, 1.79% were Asian and 35.3% were "others".) The Tenth Circuit did not reach this finding.

While it should not be necessary to make proof that EEOC's system was discriminatory to sustain Fruehauf's right to costs and fees, it is respectfully submitted that this obviously minority oriented commission is fully capable of doing what the trial judge in this case and the

trial judge in the *Datapoint* cases each found. These actions are violative of the doctrine of fairness that Congress and this Court and the Second, Fourth and Fifth Circuit Courts sought to invoke and deserve the attention of this Court so that an appropriate guideline can be laid out to guide the courts in this large field of continuing litigation.

CONCLUSION

The Tenth Circuit decision confuses the black employees' subjective contention they are qualified to be foremen with a proper objective determination of whether EEOC had a reasonable belief, after investigation and consideration of the employees' claims to bring an enforcement action, and then to continue to prosecute an obviously deficient case after discovery. The Tenth Circuit's decision seriously erodes the intent of 2000e-5(k) as written by Congress and as interpreted by this Court. *Christiansburg* should be strengthened to allow the defendants who are victims of improper prosecution to recover attorney's fees. This Petition for a Writ of Certiorari should be granted and the judgment of the Court of Appeals reversing the trial court's award of attorney fees should be reversed and additional fees awarded for work in the appellate courts.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

[Filed April 29, 1977]

Equal Employment Opportunity Commission, Plaintiff,	)	
-vs-	)	No. 75-0433-C
Fruehauf Corporation, Defendant.	)	

FINDINGS OF FACT
AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. Plaintiff, Equal Employment Opportunity Commission, is an agency of the United States Government.

2. Defendant is a Michigan corporation doing business in Oklahoma City, Oklahoma where it is engaged in the business of servicing trucks trailers, cargo containers and accessories. Fruehauf's Oklahoma City facility is the only part of Fruehauf Corporation charged in this cause.

3. Charges were filed by Matt Clark and Lloyd Edwards alleging that Defendant had engaged in unlawful employment practices under Title VII of the Civil Rights Act of 1964, as amended, 42 USC 2000E, et seq.

4. Charging Party, Lloyd Edwards, is black and was an employee of the Defendant until December 15, 1972, when he was retired with permanent physical disability.

5. Charging Party, Matt Clark, is black and is an employee of the Defendant and is now an A mechanic.

6. Fruehauf employee, Harry King, is black and is an employee of Defendant and is now an A mechanic.

7. The claim of Plaintiff for damages for Lloyd Edwards was withdrawn by Plaintiff. Harry King waived any claim for back pay.

8. Defendant's service department conducts operations on various areas including truck equipment, underconstruction, tanks, fifth wheels, wetline kits and painting.

9. There exists at Defendant the following employee positions (from lowest to highest) as follows:

Helper
B Mechanic
Low A Mechanic
Top A Mechanic
Leadman (authorized by union contract but unfilled since 1973)
Foreman
Service Manager
Branch Manager

10. The position of "Journeyman" formerly existed, but said position was abolished by the union contract in 1967. A journeyman position required an individual who could perform every job in the shop with only minimal supervision. The position of leadman required an individual who could lead others in a particular area of work. Leadman was not used in painting or underconstruction or in any area wherein Matt Clark, Lloyd Edwards and Harry King worked at any pertinent time.

11. This brance of Fruehauf Corporation has approximately 16 shop employees and two foremen. Currently employed are four blacks.

12. Fruehauf Corporation has established and published a statement of functions and responsibilities of a branch foreman and the Oklahoma City branch has received and used it since November 11, 1964. The Oklahoma City branch utilizes said statement of functions and

responsibilities of a branch foreman in the promotion process. When a vacancy occurs in the foreman position, it is the policy and practice of Defendant for the branch manager and the branch service manager, collectively to confer and review the individuals currently employed by the shop and jointly to make a decision on which individual possesses the abilities to perofrm the duties set out in the statement of functions and responsibilities of a branch foreman. In the event there are no qualified individuals in the employment of the branch, the branch manager and service manager seek applicants from the outside.

13. The union and the Defendant have jointly determined the position of foreman to be a management position.

14. The evidence showed that the requisite qualifications to be a foreman and to perform the duties set out in the statement of functions and responsibilities of a branch foreman are the knowledge of the work performed by the shop, the ability to deal with people, communicate orally and in writing effectively, the ability to supervise and direct mechanics, and to keep the service manager informed of job progress as well as the necessary desire and motivation to be a foreman, and ability to promote safety and profitable labor sales. Seniority and educational achievement are not criteria for qualification. Defendant's manager and service manager determine the employee's qualifications through the process of observation and particularly observing the employee performing those duties he would have to perform as a foreman.

15. Defendant has had at least three whites with similar longevity as Matt Clark, Lloyd Edwards and Harry King, none of whom have been promoted to the position of foreman.

16. There is no need to post notice of a vacancy in the foreman position in such a small shop. In most cases, employees would be aware of the vacancy or impending vacancy as soon as the branch manager.

17. Since 1965, this branch has promoted from the inside, or hired from the outside, twelve persons as foreman, one of which, Richard Schliesman, was of the American Indian Race.

18. Defendant has sought minority applicants for positions of service manager and foreman as well as other positions by writing letters to the Oklahoma Employment Security Commission, the Human Rights Development Institute and the United Auto Workers Union. Also, Defendant has advertised in the Oklahoma City area as well as surrounding areas for applicants for the positions of service manager and foreman, noting that Defendant is an Equal Opportunity Employer. If Defendant had a minority applicant from such efforts, they did not identify themselves as a minority applicant.

19. The evidence showed that none of Defendant's competitiors had a black foreman, a fact which further restricts the available "pool" of blacks qualified to be foreman.

20. The black population of the Oklahoma City SMSA is 8.5%. During the pertinent period, the Oklahoma City branch of Defendant employed blacks in numbers exceeding the Oklahoma City SMSA.

21. The Court finds that the Defendant has published and established sufficient objective criteria covering promotions and hiring and that such standards are not inherently discriminatory nor has an adverse impact resulted therefrom. From the testimony of expert witnesses presented by the Plaintiff and the Defendant, the Court finds that it is not possible to have purely objective standards for promotion to supervisory or management positions and the selection of a foreman requires subjective judgments by the evaluators.

22. The above described abilities sought and observed by the branch manager and the service manager in filling

the position of foreman, are implicit in Defendant's statement of functions and responsibilities.

23. Defendant's selection process is not discriminatory and provides adequate safeguards to insure that discrimination does not occur. There are no reasonable alternatives to the process utilized which would further safeguard against discrimination. The Court and Defendant both sought to obtain additional suggestions from Plaintiff and it's witnesses and they were unable to suggest any reasonable alternatives. In addition, the business necessity of safety and efficiency of Defendant, precludes any alternative policy or practice and is best satisfied by the practice employed by Defendant.

24. Plaintiff's expert testified that testing is not a reasonable alternative to the system utilized, and the Court finds that assessment centers suggested by Plaintiff's expert as a possibility are not economically feasible and in no way provide additional safeguards from discrimination. The suggestion of Plaintiff's expert of the mere physical writing of the abilities and qualifications looked to by the branch in determining whether or not an individual could perform the duties set out in the statement of functions and responsibilities would have been superfluous in this case.

25. The amendment to the union contract which abolished the position of journeyman mechanic was executed on behalf of the union by Matt Clark, Lloyd Edwards and Harry King.

26. Lloyd Edwards testified under oath in another matter that he did not want to be a foreman.

27. The sole complaint of Plaintiff and Matt Clark, Lloyd Edwards and Harry King was that Defendant has failed to promote these individuals because they are black. The evidence conclusively showed that Defendant has not been guilty of discrimination, and that Clark and King

testified that there has been no discrimination practiced at Defendant other than the failure to promote them. Both acknowledged they had not been required to do less desirable work or been paid less than equally qualified white employees. Edwards was not produced by Plaintiff although Defendant sought unsuccessfully to depose him.

28. Matt Clark, Lloyd Edwards and Harry King were not qualified to be foreman, leadman or journeyman.

29. Matt Clark is very limited in his knowledge of the work at the Fruehauf branch. Matt Clark only has working knowledge of the "underconstruction" area, and does not know, and has not shown an interest in learning the may other jobs performed by Defendant's service department. In fact, Matt Clark is not completely proficient in the area of underconstruction. There were various exhibits supported by adequate testimony to find him guilty of poor workmanship and lack of knowledge of certain jobs.

30. Matt Clark claimed in his affidavit prepared by Plaintiff that he had trained many people, but acknowledged at trial the only individual he could remember training was Wesley Griffith. However, Matt Clark had to ask Wesley Griffith which was the front and back of an axle, which is basic and rudimentary to a mechanic.

31. Matt Clark was a malingerer and wasted substantial amounts of time and would not remain on his assigned job until it was completed.

32. Evidence describing Matt Clark wasting time was convincing. Such evidence was not rebutted and conclusively showed a consistent pattern of such conduct by Matt Clark. Time and motion studies were performed by the Defendant sketching Matt Clark's wanderings and such study showed an enormous amount of time spent away from his job. Further, the evidence indicated Matt Clark did not plan his jobs adequately and, accordingly, had to make unnecessary trips to the parts counter to secure parts to complete the job.

33. Fellow employees wrote a letter protesting the fact that they had to "carry" Matt Clark since he would not do his share. The employees also cited Kenneth McGlaughlin, a white employee of similar tenure, for the same thing. A black employee, George Smith, also asserted that he did not wish to work with Matt Clark.

34. Matt Clark was not conscious of safety and its importance. Matt Clark was cited and reprimanded several times for careless and reckless driving, sometimes causing damage to company and customer property. While he was in charge, he permitted an unlicensed individual to drive a company vehicle across the state.

35. Matt Clark incurred 23 injuries in a period of two years, and made workman's compensation claims for same, a number, according to branch manager, Eldon Goss, which was exceeded only by Lloyd Edwards.

36. Matt Clark could not write legibly.

37. Matt Clark was insubordinate.

38. The Court had the opportunity to observe Matt Clark's demeanor, and articulation and finds that he is incapable of adequately communicating, orally or in writing, or understanding communications to a degree necessary of a foreman.

39. Matt Clark is not concerned with the shop making a profit as demonstrated by his wasting time, poor performance of the work assigned, lack of safety consciousness and, in fact, the evidence showed that Matt Clark affirmatively stated, without basis, that making a profit in the shop was not important because Fruehauf Corporation ran the shop for a tax loss.

40. Matt Clark did not exhibit adequate leadership ability to be either a foreman or leadman.

41. Fruehauf Corporation had every reason to dismiss Matt Clark as an employee, and for that matter, still does have sufficient reason.

42. Lloyd Edwards swore under oath in another action against Defendant he did not desire to be a foreman. Therefore, the issue of whether or not Lloyd Edwards should have been made a foreman is probably moot and his affidavit as prepared by Plaintiff is suspect.

43. Lloyd Edwards was very limited in his knowledge of the many jobs performed by the shop. Lloyd Edwards was a painter and would effectively reject assignments outside the painting area through absence, leaving early or poor performance. Lloyd Edwards was not a particularly good painter.

44. Lloyd Edwards attendance record was atrocious. Lloyd Edwards was absent more than any other employee of Defendant's branch in the past 31 years. During one period of fifty working days, Lloyd Edwards was tardy 15 times. Between January 3, 1964 and October 27, 1964, Lloyd Edwards, in addition to absences, requested permission 29 separate times to leave early. During the period from January 4, 1965 until May 13, 1965, Lloyd Edwards was either absent, tardy or left early 28 times. In the year 1972 alone, Lloyd Edwards was either absent, tardy or left early in excess of 70 times in addition to his vacation.

45. Between October 22, 1964 and December of 1972, Lloyd Edwards made 27 separate workman's compensation claims.

46. Lloyd Edwards has, since the 1950's, suffered from a nervous disorder and had a nervous breakdown in 1957 while on vacation.

47. Lloyd Edwards was insubordinate and refused to perform duties assigned.

48. Lloyd Edwards was not qualified to be a journeyman mechanic because he did not have knowledge in all areas, nor was he qualified to be a leadman because there was no position of leadman utilized in the paint department for the simple reason that there were no others regularly employed there and thus there was no one to lead.

49. Defendant had ample, substantial and reasonable grounds to dismiss Lloyd Edwards as an employee but did not do so and allowed him to retire on a physical disability pension in 1973.

50. Neither Lloyd Edwards, Matt Clark nor Harry King ever applied to be a foreman, leadman or journeyman.

51. Harry King did not file charges with either the Oklahoma Human Rights Commission or the Plaintiff at any time. Harry King was aware of the charges filed by Matt Clark and Lloyd Edwards before they were filed, but to date has never filed charges of discrimination and specifically waived any claim for back wages as a result of this suit.

52. In February of 1977 shortly before trial, King received a call from Kenneth Wohl, attorney for the Plaintiff, asking him if he would like to be a foreman for Defendant, and at that time, upon that solicitation, agreed to testify in this cause. Harry King admitted that he may have stated that he did not want to be a foreman.

53. Harry King is deficient in qualifications to be a foreman or leadman since the evidence demonstrated conclusively that Harry King is extremely slow in the performance of his duties. Harry King was very specialized in the area of stainless steel repair and worked in that area for several years. Mr. King's slowness in the perform-

ance of his duties was not a factor in Defendant's profit picture because Defendant possessed the only stainless steel welding machine in Oklahoma City, and customers had to have the work of this nature performed there or not performed at all. Accordingly, the time spent by Harry King, while admittedly excessive, was not a factor in the branch's profit. Since that time, Fruehauf Corporation has ceased making stainless Steel trailers and there is very little work left for the branch in that area. His slowness in performing work is a negative factor in the profitability of the shop.

54. Harry King is very limited in his knowledge of the other areas of the shop. Harry King has not shown an interest in learning other areas. Accordingly, he is not qualified for promotion.

55. Harry King does not possess problem analysis and decision making ability required of a foreman. Mr. King requires much supervision which, after his many years of employment as an A mechanic, should be unnecessary.

56. The Court had the opportunity at the trial to observe the demeanor and articulation of Harry King, and the Court finds that Harry King demonstrated that he is not capable of adequately communicating or understanding communications on any reasonable level required of a foreman or leadman.

57. The Court finds that the caucasian men selected for the position of foreman since 1965, and the American Indian, were all more qualified than Matt Clark, Harry King or Lloyd Edwards and were chosen pursuant to the process wherein Defendant, through it's branch manager and service manager, determine who can best perform the duties set out in the statement of functions and responsibilities. The only individuals challenged by the Plaintiff as equally qualified, were conclusively shown by the evidence and testimony to be qualified to a much greater degree than Matt Clark, Lloyd Edwards or Harry King.

58. Matt Clark and Lloyd Edwards filed charges to the effect that the only reason that they had not been promoted to the position of foreman was because of their race. Such charges were filled out on Plaintiff's forms at the Oklahoma Human Rights Commission by a Shawnee LaFrance, a black. The director of the Oklahoma Human Rights Commission is a Mr. Rose, also a black who forwarded them immediately to Plaintiff. Plaintiff dispatched it's investigator, Mr. Donald Frazier, a black, to investigate the charges of Matt Clark and Lloyd Edwards. Such investigation consisted of limited interviews of Matt Clark and Lloyd Edwards by Mr. Frazier, and a two or three hour visit to Defendant where Mr. Frazier only interviewed the then foreman, Wesley Griffith, and the branch manager, Eldon Goss. The investigations were wholly inadequate and carelessly incomplete. Had a reasonable and objective investigation been undertaken, the Plaintiff would have easily found there was no substance to the complaints whatsoever and Defendant would not have been forced to sustain the burden of defending itself.

59. Defendant's exhibits, No. 83 and No. 84, are affidavits by Matt Clark and Lloyd Edwards stating that they were not promoted to the position of foreman for the sole and only reason of their race. Mr. Frazier testified that he wrote the statements himself, and had Matt Clark and Lloyd Edwards sign them; that Mr. Frazier said he could have copied the statements off their complaints obtained by the Oklahoma Human Rights Commission without ever talking to Matt Clark or Lloyd Edwards.

60. The Court finds that the system employed by the Plaintiff in determining whether or not discrimination occurred, is discriminatory, in and of itself, pitting blacks against whites and requiring blacks to determine discrimination against other blacks by whites. The Court finds that the Plaintiff conducted, at best, a sketchy investigation of

the charges herein, and that only a superficial look behind the charges would have indicated that no discrimination was present. Accordingly, the Court finds that the suit brought by the Plaintiff on the basis of such investigation was not in good faith and was frivolous in its inception.

CONCLUSIONS OF LAW

1. Defendant has not violated the terms and provisions of 42 USC Section 2000e et seq.

2. Plaintiff has failed to present a prima facie case of violation of the cited statute. Plaintiff failed to prove statistically that Defendant's promotion policies and practices for the position of foreman had an adverse discriminatory impact. *Morita* v. *Southern California Permanente Medical Group,* 541 F.2d 217 (9th Circuit 1976), *Harper* vs. *Trans World Airlines, Inc.,* 525 F2d 409 (8th Circuit 1975), *Robinson* vs. *City of Dallas,* 514 F2d 1271 (5th Circuit 1975).

3. The Plaintiff also failed to prove that Lloyd Edwards, Matt Clark and Harry King ever applied for, or requested to be promoted to the position of foreman, leadman or journeyman, or that any of said parties were qualified for the position of foreman, leadman or journeyman. Such failure to prove application and qualification for the positions sought is fatal to proving a prima facie case for racial discrimination. *McDonnell Douglas Corp.* vs. *Green,* 411 US 792 (1973); *Griggs* vs. *Duke Power Company,* 401 US 424 (1971); *Patmon* vs. *Van Dorn Company, Plastic Machinery Division,* 498 F2d 544 (6th Circuit 1974).

4. Defendant's promotion policies and practices were not discriminatory. Defendant's published statement of functions and responsibilities of the job of foreman provided adequate objective standards to safeguard against the opportunity for discrimination. The process by which the branch manager and service manager jointly conferred in

determining the obvious qualifications necessary to perform the duties set out in the statement of functions and responsibilities satisfy the requirements that no one person, unguided by job description, make the decisions on who should be promoted to a supervisory position. *Rowe* vs. *General Motors Corporation,* 457 F2d 348 (5th Circuit 1972); *Rogers* vs. *International Paper Company,* 510 F2d 1340 (8th Circuit 1975).

5. It is impossible to make decisions about the hiring and promotion in a supervisory and managerial job by objective standards alone. The published job description herein constitutes, at a minimum, the nondiscriminatory goals of the Defendant, and as applied herein, adequately safeguards against the opportunity of, and averts, discrimination. *Rogers* vs. *International Paper Company Infra.*

6. Defendant's actions and intentions were nondiscriminatory and the result of Defendant's promotion policies and practices were not discriminatory. In addition, the Defendant's business necessity for safety and efficiency required the policy and practice employed. *Spurlock* vs. *United Airlines,* 475 F2d 216 (10th Circuit 1972).

7. The case of *Muller* vs. *U.S. Steel Corporation,* 509 F2d 923 (10th Circuit 1975) is distinguishable from the instant case. In Muller, the Court found no objective standards and that the Plaintiff was qualified.

8. Defendant is entitled to reasonable attorneys fee since this action was not justified. 42 USC Section 2000e 5(k).

(s) *Stephen S. Chandler*
United States District Judge

ENTERED IN JUDGMENT DOCKET ON APR 29 1977

JUDGMENT

[Filed April 29 1977]

Now on this 29th day of April, 1977, this cause, having been regularly assigned for trial, comes on to be heard in its regular order. Plaintiff appears in person and by its attorneys, Kenneth Wohl and Phillip Jones, and the Defendant appears in person and by its attorneys, Norman E. Reynolds and V. Burns Hargis; and the Court having heard the evidence of the witnesses sworn and examined in open Court and having heard argument, and being fully advised in the premises, finds that the allegations of Plaintiff's Complaint are not supported by the evidence, and judgment is, therefore, rendered for the Defendant, and it is adjudged that Defendant recover its costs and attorneys' fees in the amount of $25,000.00 from the Plaintiff.

(s) *Stephen S. Chandler*
United States District Judge

ENTERED IN JUDGMENT DOCKET ON APR 29 1977

ORDER

[Filed March 31, 1978]

After careful consideration of the arguments presented by counsel at the hearing on plaintiff's motion to vacate the judgment of attorney's fees and the letter briefs submitted by counsel, which are attached hereto in order that they may be part of the permanent record,

IT IS ORDERED that plaintiff's motion to vacate the judgment of attorney's fees be, and the same hereby is, overruled.

DATED THIS 31ST DAY OF MARCH, 1978.

(s) *Stephen S. Chandler*
United States District Judge

APPENDIX B

PUBLISH [Filed November 9, 1979]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 78-1356

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff-Appellant, v. FRUEHAUF CORPORATION, Defendant-Appellee.	)	Appeal from the United States District Court for the Western District of Oklahoma (D.C. No. 75-0433-C)

Vella M. Fink (Abner W. Sibal, General Counsel; Joseph T. Eddins, Associate General Counsel; and Lutz Alexander Prager, on the brief), for Plaintiff-Appellant.
Norman E. Reynolds (V. Burns Hargis of Reynolds, Ridings & Hargis, on the brief), for Defendant-Appellee.

Before McWILLIAMS, DOYLE and LOGAN, Circuit Judges.

McWILLIAMS, Circuit Judge.

The Equal Employment Opportunity Commission brought the present action against Fruehauf Corporation charging employment discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e), *et seq.* The alleged discrimination was Fruehauf's refusal to promote blacks to the position of foreman in Fruehauf's Oklahoma City facility. Fruehauf is a Michigan corporation doing business in Oklahoma and it maintains a shop in Oklahoma City where it services truck

trailers. On motion, the action was dismissed on the ground that the action was not instituted within 180 days from the date of the filing of the individual charge of discrimination upon which the Commission's present action is based. 42 U.S.C. § 2000(e)-5(f)(1). On appeal, we reversed and remanded for further proceedings. Equal Employment Opportunity Commission v. Fruehauf Corporation, unpublished opinion No. 75-1686, filed May 17, 1976.

After remand, the case was tried to the court, sitting without a jury. The trial court in detailed findings and conclusions found for Fruehauf and entered judgment in its favor. Additionally, the trial court found that the action brought by EEOC against Fruehauf was not brought in good faith and was frivolous from its inception. Accordingly, the trial court entered judgment in favor of Fruehauf against EEOC in the sum of $25,000 as attorney's fees. EEOC appeals the judgment thus entered. We affirm in part, and reverse in part.

The Fruehauf shop in Oklahoma City is a relatively small one, employing only about 20 persons. There are two foremen. At the time of the trial of this matter there were 4 black employees, one of whom had been only recently hired. The other 3 blacks were long-time employees. Two of the black employees, Lloyd Edwards and Matt Clark, filed charges with the Oklahoma Human Rights Commission, alleging that Fruehauf had discriminated against them because of their race. Specifically, the complaint was that they had been passed over when the company was filling the position known as shop foreman. This complaint was forwarded to the EEOC, and the complaint was investigated by an EEOC investigator, one Donald Frazier, who had been with the EEOC for some time during the course of which he had investigated some 250 to 300 charges of discrimination. Frazier interviewed both Edwards and Clark, the compainants, and reviewed certain answers of Fruehauf

to interrogatories. He then conducted a 3-hour on-the-site investigation of the Fruehauf shop. Frazier deposed the branch manager, one Eldon Goss, who was in charge of the shop, and did some additional interviewing of personnel. On the basis of Frazier's report the EEOC found that there was reasonable cause to believe that the charges of discrimination were true. Subsequent conciliation efforts failed, and the present suit was then filed.

The action was based on alleged discrimination against the 3 black persons who were long-time Fruehauf employees, which included one Harry King, in addition to Edwards and Clark. As above indicated, the trial court initially dismissed the action on the ground that suit had not been timely filed. On appeal, we reversed. On remand, the case was tried to the court. After all the evidence from both sides had been presented, the trial court found for Fruehauf and entered judgment to that effect.

The trial court found, *inter alia*, that the EEOC had not made out a *prima facie* case, and on appeal the EEOC argues that such finding is clearly erroneous, both as a matter of fact and of law. Whether a *prima facie* case was made out by the EEOC is in our view largely a matter of semantics and for the sake of argument we are willing to concede that such was established. However, the trial court made other findings, amply supported by the record, which effectively preclude the EEOC from prevailing in this appeal.

Under the authorities one essential element in a case of this type is that there be a showing that the person in question be qualified for the position to which he aspires. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Rich v. Martin Marietta Corp., 522 F.2d 333, 346-347 (10th Cir. 1978). As indicated, we shall concede that EEOC made a *prima facie* showing in this regard. The testimony of the individuals involved, if nothing else, would indicate

that each believed himself qualified to serve as shop foreman. However, such did not end the matter. Eldon Goss, Fruehauf's branch manager, testified at length, and the gist of his testimony was that none of the three was qualified for the position of shop foreman. Indeed, on appeal, as we understand it, EEOC concedes that the trial court's finding that Edwards and Clark were unqualified to serve as shop foreman is not clearly erroneous, and hence must be upheld.

On appeal EEOC argues that the trial court's finding that Harry King was also not qualified to serve as shop foreman is clearly erroneous. We disagree.

The trial court's finding that Harry King was not qualified to serve as shop foreman was based primarily on Goss's testimony. It was Goss's testimony, incidentally, which was the basis for the trial court's finding that neither Edwards nor Clark was qualified for the position as shop foreman. As concerns King, Goss testified that King was "slow" in the performance of his shop duties; that King had specialized in the area of stainless steel repair, and had only limited knowledge of the other working areas within the shop; that King became confused under pressure; and that in his opinion King was not qualified to serve as shop foreman. Without further detailing of evidentiary matter, we conclude that the trial court's finding that King was not qualified to serve as shop foreman is not clearly erroneous, and therefore on appeal cannot be disturbed by us. The trial judge in this instance is of course the finder of the facts. He passes on the credibility of the witnesses. It would be beyond our province to reverse the trial court's finding and enter a finding of our own that King is qualified to serve as shop foreman.

As above mentioned, the trial court found that the EEOC had acted in bad faith and that the entire case was frivolous from its inception, and based on such finding assessed attorney's fees in the sum of $25,000 against EEOC.

Needless to say, EEOC appeals that particular judgment, and that is perhaps the main issue in the case.

42 U.S.C. § 2000e-5(k) provides that a reasonable attorney's fee may be awarded the prevailing party in an action of the present type. The Supreme Court in Christiansburg Garmet Co. v. EEOC, 434 U.S. 412 (1978) held that a prevailing defendant in a Title VII proceeding is to be awarded attorney's fees only when the court in the exercise of its discretion finds that the plaintiff's action was frivolous, unreasonable or without foundation. As mentioned above, the trial court found that the instant case was frivolous in its inception and was motivated in bad faith. However, our study of the record convinces us that in awarding attorney's fees in the sum of $25,000 the trial court abused its discretion and therefore such award must be vacated.

The fact that the plaintiff in this case did not prevail on the merits does not necessarily mean that its action was frivolous, unreasonable or without foundation. *Christiansburg*, 434 U.S. at 422. The instant case had its inception when 2 blacks complained that they were being discriminated against in job promotion because of their race. No black had ever served as a shop foreman at Fruehauf, though several had served as mechanics for a considerable length of time. Investigation of the complaints was made in due course and in the usual manner. There is nothing in the record before us to support the trial court's finding that the action was frivolous from its inception, or that in prosecuting the action EEOC was motivated by something other than good faith, presumably bad faith. Cottrell v. Newspaper Agency Corporation, 590 F.2d 836, 839 (10th Cir. 1979).

The judgment awarding attorney's fees in the sum of $25,000 is reversed. In all other respects, the judgment is affirmed.

APPENDIX C

NOVEMBER TERM — DECEMBER 26, 1979

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, and Honorable Stephanie K. Seymour, Circuit Judges.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff-Appellant,	)	
vs.	)	No. 78-1356
FRUEHAUF CORPORATION, Defendant-Appellee.	)	

This matter comes on for consideration of the petition of appellee for rehearing together with a suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by Circuit Judges McWilliams, Doyle, and Logan, the panel that rendered the decision sought to be reheard.

The Clerk having transmitted the suggestion to the members of the panel and the judges who are in regular active service and no member of the panel or a judge in regular active service having requested a vote on the suggestion, the suggestion for rehearing en banc is denied pursuant to Rule 35, Federal Rules of Appellate Procedure.

(s) *Howard K. Phillips*
HOWARD K. PHILLIPS
Clerk